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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 696

In the Matter

of

GODFREY-KEELER CO., INC., Debtor,
Petitioner,

—against—

THE WICKES BOILER COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JACOB LEVINE,
Counsel for Petitioner.

THE COURT PRESS, N. Y. C.

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GODFREY-KEELER CO., INC., Debtor,

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—against—

THE WICKES BOILER COMPANY, INC.,

Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals, for the Second Circuit.

Petitioner respectfully prays that a writ of certiorari issue to review an order of the Circuit Court of Appeals, for the Second Circuit, reversing upon reargument a previous decision by the said Court, and affirming by a unanimous court an order of the United States District Court, for the Southern District of New York, which order affirmed an order of the Referee.

Opinions Below.

The opinions of the District Court and Referee are not officially reported. The first opinion of the Circuit Court of Appeals is reported in 116 F. (2d)

842. The opinion of the Circuit Court of Appeals, on reargument, is reported in 121 F. (2d) 415. Both opinions of the Circuit Court of Appeals were written by Judge Augustus N. Hand.

Jurisdiction.

The order of the Circuit Court of Appeals was entered on the 12th day of July, 1941 (R., p. 61). The jurisdiction of this court is invoked under §240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. §347).

Questions Presented.

The questions presented are:

(1) Is §36a of the New York Lien Law a penal or substantive statute creating a civil right and remedy;

(2) If substantive, may a trust be impressed for the benefit of a materialman creditor, where the creditor has failed to file a mechanic's lien within the statutory filing period and the monies sought to be impressed with a trust are received by the trustee in bankruptcy as distinguished from the original "contractor";

(3) Does §36a of the New York Lien Law create a class of creditors who, in effect, would be entitled to priority in contravention of §64 of the Bankruptcy Act.

Statutes and General Orders Involved.

The statutes involved are 64 of the Bankruptcy Act, which by the 1938 amendment eliminated certain

state priorities, and 36a of the New York Lien Law, which provides:

> "§36-a. CONTRACTOR WHO DIVERTS FUNDS GUILTY OF LARCENY. The funds received by a contractor from an owner for the improvement of real property are hereby declared to constitute trust funds in the hands of such contractor to be applied first to the payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, and to the payment of premiums on surety bond or bonds filed and premiums on insurance accruing during the making of the improvement and any contractor and any officer, director or agent of any contractor who applies or consents to the application of such funds for any other purpose and fails to pay the claims hereinbefore mentioned is guilty of larceny and punishable as provided in section thirteen hundred and two of the penal law."

Statement.

In May 1938, petitioner, Godfrey-Keeler Co., Inc., entered into a contract with the Brooklyn Yarn Dye Company to install a power plant and heating system in the premises of the latter. Contemporaneously, petitioner, as contractor, entered into subcontracts with the respondent, The Wickes Boiler Company, Inc., whereby the latter agreed to furnish boilers and insulating panels for the heating system (R., fols. 10-11). Thereafter, on November 1st, 1939, petitioner filed a petition for an arrangement under Chapter XI of the Bankruptcy Act and an order was made continuing the Debtor in possession (R., fol. 13).

The respondent never filed a mechanic's lien and its time to do so had expired when the Debtor filed its petition for an arrangement (R., fol. 62).

The respondent was named in the schedules as an unsecured creditor for $1810.50 (R., fol. 12).

On November 14th, 1939, the respondent instituted this proceeding before the Referee to strike its name from the schedules of unsecured creditors and to impress a trust pursuant to §36a of the New York Lien Law on the monies to be thereafter payable by Brooklyn Yarn Dye Company (R., fols. 6-8). The Referee granted the application and impressed a trust in favor of the respondent (R., fols. 59-80).

Upon petition to review to the District Court, the Referee's order was affirmed (R., fols. 88-96). The Debtor appealed, as of right, to the United States Circuit Court of Appeals, for the Second Circuit, which Court, by opinion dated December 24th, 1940, reversed the order of the District Court and dismissed the petition of the respondent.

Thereafter, a motion for re-argument was granted, and by order dated July 12th, 1941, the Circuit Court of Appeals reversed its former decision and affirmed the order of the District Court.

Specification of Errors To Be Urged.

The Court below erred

(1) In refusing to hold that §36a of the New York Lien Law is a penal statute;

(2) in holding that the trust arose where the funds are received directly by a trustee in bankruptcy as distinguished from the contractor;

(3) in holding that the trust arose in favor of a materialman who had failed to file a mechanic's lien within the statutory period; and

(4) in holding that §36a does not contravene §64 of the Bankruptcy Act.

Reasons for Granting the Writ.

The decision by the Circuit Court in the present case is in direct conflict with the holding of the Circuit Court of Appeals, Sixth Circuit. The latter Court, in *Edward Misch Co.'s Estate,* 112 F. (2d) 1007, aff'g 34 F. Supp. 781, affirmed an order of the Referee denying an identical application by a materialman creditor. There, too, the application to impress a trust was based upon a state statute of Michigan similar to §36a of the New York Lien Law. The Court there, in refusing to impress a trust, held that the state statute was exclusively penal.

Statutes similar in purpose to §36a of the New York Lien Law have been enacted in

Arkansas	Minnesota	North Carolina
Kentucky	Nebraska	South Dakota
Michigan	Wisconsin	Ohio

The final determination as to whether such a statute is penal or substantive thus creating civil rights and remedies, is of major importance to the administration of the bankrupt estates of contractors. The determination of that question by this Court will definitely establish and limit in insolvency proceedings the property rights of materialmen and subcontractors claiming to be beneficiaries of trust statutes.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

GODFREY-KEELER CO., INC.,
by JACOB LEVINE,
Counsel for Petitioner.